Supreme Court, U.S.
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No. 91-687

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

STATE OF MONTANA,

Petitioner,

v.

DONALD GLENN IMLAY,

Respondent.

On Writ of Certiorari To The Montana Supreme Court

RESPONSE TO SUPPLEMENTAL BRIEF

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BEST AVAILABLE COPY

THE DRUMMOND CASES ARE NOT APPLICABLE TO MONTANA v. IMLAY.

In his Supplemental Brief, the respondent refers to two cases recently decided in state district court, in an attempt to show what might have happened to Imlay had he admitted in therapy that he committed the crime of which he was already convicted. State v. Drummond, Montana Fifth Judicial District Court, Jefferson County, Cause Nos. 1364 and 1365. The Drummond cases are inapplicable and irrelevant to the Imlay case. Further, the cases are not final. Judgment issued very recently in these cases, with Drummond reserving the right to appeal certain issues. See App. 37a. Cases that are not final can hardly be considered "intervening authority" as described by Sup. Ct. R. 25.5.

There are three separate criminal cases involving Mr. Drummond. Mr. Drummond was first convicted on a guilty plea of sexual intercourse without consent of a severely mentally disabled woman who was a resident at the Montana Developmental Center, a state hospital where Drummond was an employee. See "Findings of Fact, Conclusions of Law, Judgment & Sentence," Montana Fifth Judicial District Court, Jefferson County Cause No. 1252 (App. 1a-7a). Drummond was sentenced to 20 years in prison with the recommendation that he not be eligible for parole until he had completed the prison's sex offender program. (App. 4a).

Drummond was later charged with the sexual assault of a child, and, in the alternative, incest. (App. 12a). After Drummond had been sent to prison for the rape of the resident at the Montana Developmental Center, the child told her therapist that Drummond had sexually assaulted her. See paras. 3 and 5, Motion for Leave to File Information, App. 10a. The Montana Department of

Family Services investigated the child's statements and obtained from Drummond a written release of all medical and psychological records at the prison. See "Release Form," App. 16a. After the release form had been signed and during an interview with two social workers at which Drummond's therapist was present, Drummond admitted to sexually assaulting the child. App. 11a. Drummond has recently entered a plea of guilty to the crime. App. 20a.

The Drummond sexual assault case is distinctly different from any hypothetical scenario posited by respondent concerning Imlay. Drummond had already pled guilty to the earlier rape. Drummond signed a release of all his medical records at the prison. Drummond's confession to the social workers did not occur during the regular course of sex offender therapy at the prison. Drummond's confession did not relate to the crime of which he was already convicted, but to a separate unrelated crime.

The legal issue in Montana v. Imlay concerns only statements relating to the crime for which Imlay has already been convicted. The issue of whether the Fifth Amendment privilege against self-incrimination is implicated when a defendant is asked to reveal uncharged criminal conduct during sex offender therapy is not before this Court.[1]

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[1]This is a legal issue that has engendered much debate in the context of the application of United States Sentencing Guideline § 3E1.1, because the guideline allows credit for "acceptance of responsibility for his [the defendant's] criminal conduct." There is a conflict among the circuit courts as to whether the Fifth Amendment privilege is implicated when a defendant accepts responsibility for all criminal conduct, including uncharged conduct. See, e.g., United States v. O'Neil, 936 F.2d

Respondent also refers to a perjury charge brought against Drummond. Drummond was charged with perjury because he made two inconsistent statements in court and under oath. App. 30a-31a. At the sentencing hearing on the rape charge, Drummond had stated under oath that the rape was the only incident of sexual misconduct by him at the Montana Developmental Center. App. 30a. The parents of the victim later sued the State of Montana for damages arising out of the rape. At the trial on the civil suit, Drummond testified that he had sexually assaulted the victim a number of times prior to raping her and that he had sexually assaulted other residents of the Center. App. 31a. Drummond has also recently pled guilty to the perjury charge. App. 34a.

With respect to the perjury charge, the differences between the Drummond case and the Imlay case are readily apparent. Drummond made two contradictory sworn statements under oath and thus committed perjury. Imlay's statements, had he made them, would have been during therapy. See Mont. Code Ann. § 45-7-201(6).[2] Statements made in therapy are not sworn statements, nor

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599 (1st Cir. 1991) (recognizing controversy over whether § 3E1.1 encompasses conduct other than that for which a defendant has already been convicted); see also Pet. Brief at 35-36.

[2]Mont. Code Ann. § 45-7-201(6) provides:

> Where the defendant made inconsistent statements under oath or equivalent affirmation, both having been made within the period of the statute of limitations, the prosecution may proceed by setting forth the inconsistent statements in a single count alleging in the alternative that one or the other was false and not believed by the defendant. In such case it shall not be necessary for the prosecution to prove which statement was false but only that one or the other was false and not believed by the defendant to be true.

are such statements by themselves proof of perjury.[3] Under State v. Thiel, 768 P.2d 343 (Mont. 1989), fundamental fairness would prohibit a prosecution for perjury based solely upon statements made in therapy. Even if such a prosecution were allowed, it is well settled that the Fifth Amendment privilege does not protect perjury. See Pet. Br. at 21, n.16.

Thus, nothing respondent has suggested in his Supplemental Brief makes a prosecution for perjury any more realistic or probable. The threat of perjury has been set up by respondent as a red herring, designed to draw this Court's attention away from the fundamental constitutional considerations that control this case. Regardless of the hypothetical incriminating effect of statements made in therapy, the critical questions remain as to whether Mr. Imlay was penalized for a valid invocation of his Fifth Amendment privilege when his probation was revoked and whether the Fifth Amendment privilege should be used to deny the benefit of outpatient therapy in a community-based setting.

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[3]Respondent has never recognized the high and strict standards that control a perjury prosecution. Mont. Code Ann. § 45-7-201(7) expressly provides that "[n]o person shall be convicted of an offense under this section where proof of falsity rests solely upon the testimony of a single person other than the defendant." The proof of perjury must be more than the contradiction testimony of a person other than the defendant. See also State v. Scanlon, 569 P.2d 368, 378 (Mont. 1977). Further, indirect or circumstantial evidence, such as the testimony of a therapist concerning a statement a defendant had made in therapy contradicting a sworn statement, would not by itself be proof of perjury. Id. at 382.

For the foregoing reasons, the State of Montana asks this Court to disregard the information in the Supplemental Brief filed by the respondent.

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September 1992

APPENDIX

APPENDIX

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MONTANA FIFTH JUDICIAL DISTRICT COURT

JEFFERSON COUNTY

THE STATE OF MONTANA, Plaintiff, vs. LLOYD DEAN DRUMMOND, Defendant.	)	Cause No. 1252 **FINDINGS OF FACT, CONCLUSIONS OF LAW, JUDGMENT & SENTENCE**

A sentencing hearing was held in this cause on October 11, 1989. Evidence, both oral and documentary, was received, and recommendations for a sentence were proposed.

The Court now having considered all relevant factors, including the nature and circumstances of the charges, the presentence report, the psychological evaluations, the respective recommendations, the Defendant's voluntary plea and the judically accepted sentencing criteria, does now make its:

FINDINGS OF FACT

1. On August 9, 1989, the Defendant, LLOYD DEAN DRUMMOND, appeared in Court with counsel and withdrew a previously entered plea of not guilty and entered a voluntary plea of GUILTY to the charge set out in the Information, which plea was by the Court accepted.

2. The ordered presentence report indicates that the Defendant has one previous felony conviction for mail fraud and served time in a Federal prison. He also had a number of misdemeanor convictions for shoplifting, larceny and theft.

3. The Defendant's own version of the incident as given to the probation officers:

> "On 7-9-88, I worked an overtime shift at M.D.C. from 10:00 p.m. to 6:00 a.m. following my normal shift of 2:00 p.m. to 10 p.m. Shortly after midnight I heard a noise coming from the girls room. Upon investigating I noticed Gretta standing in the doorway of the bedroom by the bathroom. I told her to go back to bed. She went and stood by the bed so I said for her to get in the bed and get back to sleep. I started for the bedroom door and turned around to check on her before going out. She was lying on her back with her nightgown up above her hips and her legs apart. I looked at her and closed the door and went over and had sexual intercourse with her. She didn't seem upset or didn't try to push

me away. I got up, covered her with her blanket and went back out to the day hall."

/s/ L. Dean Drummond

The Defendant gave substantially the same version of the incident to the personnel of the Sexual Assault Treatment Program of Mental Health Services, Inc. who he retained for an evaluation at his expense; although in the latter report he attempts to minimize his involvement by suggesting the victim consented by her actions.

4. At the time of the incident, Defendant was an employee at the Montana Developmental Center and the victim was a 41 year old profoundly retarded resident of the institution. She was and is nonverbal and incapable of giving consent. The victim became pregnant as a result of the incident and subsequently gave birth to a child. The Mental Health Services' evaluation found little or no remorse on the part of the Defendant, as does this Court.

The Mental Health Services' evaluation indicated that the Defendant may have been involved in numerous other illegal sexual behaviors, not only with the victim in this case but with others similarly situated. The evidence adduced at the sentencing hearing seems to confirm this conclusion. The Defendant admitted that he needed treatment and the report indicated he was motivated for same. The report strongly recommended inpatient treatment, but that he be held accountable for his actions in this case.

5. The Defendant is indigent, is married and has three minor children. The only practical facility for the

treatment of Defendant's admitted problem is the Sex Offender Program at the Montana State Prison.

From the foregoing Findings of Fact, the Court now makes its:

CONCLUSIONS OF LAW

The Defendant, LLOYD DEAN DRUMMOND, is GUILTY of the crime of SEXUAL INTERCOURSE WITHOUT CONSENT, a Felony, as specified in § 45-5-503, MCA. There are no mitigating circumstances. Accordingly, the Court now enters its:

JUDGMENT & SENTENCE

I

The Defendant is GUILTY of the offense as set out in the Information.

II

That for LLOYD DEAN DRUMMOND's conviction as aforesaid, he is hereby sentenced to a term of twenty years in the Montana State Prison.

III

Upon Defendant's incarceration, he shall enroll, as soon as possible, in the prison's Sex Offender Program and he shall not be considered eligible for parole until he shall have satisfactorily completed that program.

IV

The Defendant is certified as "non-dangerous" for purposes of parole eligibility.

V

The Defendant is remanded to the Sheriff of this county who shall execute the terms of this sentence by delivering the Defendant to the Montana State Prison.

DATED THIS 18th day of October, 1989.

/s/ FRANK M. DAVIS
District Judge

REASONS FOR SENTENCE

The Court has imposed the maximum sentence allowable and would have increased it, had it the power to so do. The Defendant's offense was against a profoundly retarded victim, mentally and physically incapable of consenting or resisting. The offense is compounded by the fact that he was entrusted and charged with the responsibility for the immediate institutional care of a helpless "Child of a Lesser God". To characterize his act as outrageous is an understatement. The crime would have gone undetected had not the victim become pregnant.

The Court finds no mitigating circumstances, except the minor one of an admission that he is a sex offender and in need of treatment. This concession was only after he was caught.

Accordingly, LLOYD DEAN DRUMMOND must be punished and at least for a time removed from the society against whom he has transgressed. Hopefully, this punishment will not only act as a deterrence to Defendant, it will be a message to other potential offenders and particularly to the employees of our State health care institutions who may be tempted, as was Defendant, to violate their trust.

The Court recognizes that one of the principles of sentencing is the concept of rehabilitation. If there is any hope of rehabilitation for this Defendant, it is in a place of total confinement. That is not only the Court's opinion, it is the opinion of his own evaluators. Under the circumstances of this case, the Montana State Prison is the only viable alternative.

The Court has considered the impact of the offense on the helpless victim, her family, the Defendant's fellow employees at the Montana Developmental Center and, indeed, the community of Boulder. That impact has been a traumatic and devastating one. The emotional scars on the victim's distraught family is [sic] perhaps irreparable. They can only take some solace in the fact that the sentence assures that he will not soon offend again.

The Court has considered the impact of a prison sentence on Defendant's own unfortunate family, but notes persuasive unrebutted testimony to the effect the wife and three children actually seemed more secure and happy when Defendant was absent from the home.

DATED THIS 18th day of October, 1989.

/S/ FRANK M. DAVIS
District Judge

cc: Richard J. Llewellyn
Joseph R. Massman
Jefferson County Sheriff
Montana State Prison
Lloyd Dean Drummond
James Wright

RICHARD J. LLEWELLYN
Jefferson County Attorney
Courthouse, P.O. Box H
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(406) 225-4251 ext. 57

MONTANA FIFTH JUDICIAL DISTRICT
COURT, JEFFERSON COUNTY

STATE OF MONTANA, Plaintiff, v. LLOYD DEAN DRUMMOND, Defendant.	Cause No. 1365 **MOTION FOR LEAVE TO FILE INFORMATION AND AFFIDAVIT IN SUPPORT THEREOF**

MOTION

COMES NOW Richard J. Llewellyn, Jefferson County Attorney, and moves this Court for leave to file an Information charging the above-named Defendant, LLOYD DEAN DRUMMOND, with committing the criminal offenses of SEXUAL ASSAULT, a felony, in violation of Section 45-5-502, MCA, or, in the alternative, INCEST, a felony, in violation of Section 45-5-507, MCA.

This motion is made on the grounds and for the reasons set forth in the accompanying Affidavit filed in support hereof.

DATED this 29th day of January, 1992.

/s/ Richard J. Llewellyn
RICHARD J. LLEWELLYN
Jefferson County Attorney

AFFIDAVIT

STATE OF MONTANA)
: ss.
County of Jefferson)

COMES NOW Richard J. Llewellyn and, being first duly sworn, deposes and upon his oath states that:

1. Affiant is the duly elected, qualified and authorized County Attorney for Jefferson County, Montana. He makes this Affidavit, in his said capacity, in support of the foregoing Motion for Leave to File Information.

2. Affiant has interviewed Cherrill Rolfe (a social worker with the Montana Department of Family Services), Don Ferriter (a social worker with the Montana Department of Family Services), Barbara Howe (a child psychologist practicing in Helena, Montana, who counsels Jane Doe), and Sharon Miller. Affiant has also reviewed various investigative reports, prepared by DFS social workers, all pertaining to the events hereinafter described. On the basis of all such interviews and investigative reports, Affiant makes the allegations hereinafter set forth.

3. Jane Doe is a female descendant of Lloyd Dean Drummond. During the first ten months in 1989, between January 1 and October 11 of that year, Jane Doe was under the age of fourteen (14) years. Both she and Drummond resided in the Drummond family home, and she was in frequent contact with Drummond.

4. In early 1989, Drummond was charged with raping a profoundly retarded resident of the Montana Developmental Center. (While the case was pending, he had been released to the "custody" of a local Boulder minister, and he resided in his family home.) Drummond ultimately entered a plea of "guilty" to the charge and, on October 11, 1989, was sentenced to the Montana State Prison.

5. Between approximately October of 1991 and January of 1992, Jane Doe advised several persons that she had been sexually abused by Drummond. According to Jane Doe, Drummond had sexually assaulted her (by touching her "private parts" so that they "hurt") on numerous occasions between approximately January 1 and October 11, 1989. These persons included Barbara Howe (Jane Doe's counselor) and Sharon Miller.

6. As a convicted sex offender, Drummond was required to participate in a sex offender program at the Montana State Prison. During the course of such program, Drummond admitted to having sexually abused Jane Doe. This information was communicated by prison officials to the Montana Department of Family Services, in accordance with the applicable Montana law requiring the reporting of child abuse information.

7. On December 23, 1991, Drummond was interviewed by Don Ferriter, a child protective services social worker with the Department of Family Services. The interview was conducted in the presence of Pennie Lundstrom (also a DFS social worker) and Tim Hamm (a prison "therapist"). In the course of the interview, Drummond stated that, after approximately December of 1988, he had begun a sexually-oriented "grooming" process with Jane Doe. (Drummond stated that he was "attracted" and sexually "aroused" by Jane Doe's presence.) According to Drummond, this "grooming" process was intended to gratify him sexually, as his employment at the Montana Developmental Center had been terminated so that he no longer had "sexual" access to the institution's residents, and such conduct was apparently intended to ultimately prepare Jane Doe for an act of sexual intercourse with Drummond. According to Drummond, he touched Jane Doe "in the crotch" twenty (20) to thirty (30) times during a period of approximately six (6) to ten (10) months.

6. Further, Affiant sayeth naught.

/s/ Richard J. Llewellyn
RICHARD J. LLEWELLYN
Jefferson County Attorney

SUBSCRIBED AND SWORN TO before me this 29th day of January, 1992.

(NOTARIAL SEAL)

/s/ Cheri L. Kramer
Notary Public, State of Montana
Residing at: East Helena
My Commission expires: 1/25/95

RICHARD J. LLEWELLYN
Jefferson County Attorney
Courthouse, P.O. Box H
Boulder, Montana 59632
(406) 225-4251 ext. 57

MONTANA FIFTH JUDICIAL DISTRICT COURT,
JEFFERSON COUNTY

STATE OF MONTANA,	)	Cause No. 1365
	)	
Plaintiff,	)	**INFORMATION**
	)	
v.	)	
	)	
LLOYD DEAN DRUMMOND,	)	
	)	
Defendant.	)	
	)	
STATE OF MONTANA	)	
	:	ss.
County of Jefferson	)	

Richard J. Llewellyn, Jefferson County Attorney, being first duly sworn, deposes and upon his oath says that the above-named Defendant, LLOYD DEAN DRUMMOND, has committed the following criminal offenses:

(a) SEXUAL ASSAULT, a felony, in violation of Section 45-5-502, MCA, as alleged in Count I hereof; or, in the alternative,

(b) INCEST, a felony, in violation of Section 45-5-502, MCA, as alleged in Count II hereof.

The offense of SEXUAL ASSAULT, a felony, is punishable by imprisonment in the Montana State Prison for a term, of not less than two (2) years or more than twenty (20) years and may also be punishable by a fine in an amount not exceeding $50,000 in addition to the specified prison term. The offense of INCEST, a felony, is punishable by imprisonment in the Montana State Prison for a term not exceeding twenty (20) years and/or by a fine not exceeding $50,000.

The facts constituting the said offenses are as follows:

COUNT I
(Sexual Assault)

The Defendant, LLOYD DEAN DRUMMOND, on repeated occasions between approximately January 1 and October 11, 1989, at Boulder, within Jefferson County, Montana, knowingly subjected Jane Doe to sexual contact without consent by touching or fondling her genitals, genital area, and/or "crotch" area; at such time, Jane Doe was a female child less than fourteen (14) years old, was not the Defendant's spouse and was unable to consent to any such acts by the Defendant because of her age, and the Defendant was three (3) or more years older than Jane Doe;

With the above-described conduct of the Defendant being in violation of Section 45-5-502, MCA, and constituting the criminal offense of SEXUAL ASSAULT, a felony; or,

COUNT II
(Incest)

As a different and alternative statement of the same offense alleged in Count I hereof,

The Defendant, LLOYD DEAN DRUMMOND, on repeated occasions between approximately January 1 and October 11, 1989, at Boulder, within Jefferson County, Montana, knowingly had sexual contact with Jane Doe, a female descendent, by touching or fondling her genitals, genital area, and/or "crotch" area; at such time, Jane Doe was under sixteen (16) years of age, and the Defendant was three (3) or more years older than Jane Doe;

With the above-described conduct of the Defendant being in violation of Section 45-5-507, MCA, and constituting the criminal offense of INCEST, a felony.

A list of possible witnesses for the State of Montana, now known to the prosecution, is as follows:

Jane Doe Montana City, MT	Sharon Miller Montana City, MT
Barbara Howe Helena, MT	Cherrill Rolfe Helena, MT
Don Ferriter Helena, MT	Pennie Lundstrom Butte, MT
Tim Hamm Deer Lodge, MT	Tom Dawson Boulder, MT

DATED this 29th day of January, 1992.

/s/ Richard J. Llewellyn
RICHARD J. LLEWELLYN
Jefferson County Attorney

SUBSCRIBED AND SWORN TO before me this 29th day of January, 1992.

/s/ Cheri L. Kramer
(NOTARIAL SEAL) Notary Public, State of Montana
Residing at: East Helena
My Commission Expires: 1/25/95

LEWIS AND CLARK COUNTY
DEPARTMENT OF FAMILY SERVICES
316 N. Park, Box 817
Helena, MT 59624

RELEASE FORM

Permission is hereby granted for Lewis and Clark County Department of Family Services to release/obtain medical, psychological, social, psychiatric and/or other relevant information from/to:

Montana State Prison*
Address: 700 Conley Lake Rd.
Deer Lodge, MT 59722

pertaining to the records of: Lloyd Dean Drummond
Signature: /s/ L. Dean Drummond

Address: 700 Conley Lake Road

Deer Lodge, Mt. 59722

Relationship (if signed by someone other than client):

_____

Date: 11-26, 19 91.

*The blanks are completed in handwriting in the original form.

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Attorney for Defendant

MONTANA FIFTH JUDICIAL DISTRICT
COURT, JEFFERSON COUNTY

* * * * * * * * *

STATE OF MONTANA,	)	Cause No. 1365
	)	
Plaintiff,	)	MOTION FOR
	)	PROTECTIVE ORDER
LLOYD DEAN	)	PREVENTING
DRUMMOND,	)	PSYCHOLOGIST
	)	FROM TESTIFYING
Defendant.	)	

* * * * * * * * *

COMES NOW the Defendant, Lloyd Dean Drummond, by and through his counsel of record, and respectfully moves the Court for a protective order disallowing any testimony by any MSP staff psychologist involved in the Sexual Offender Treatment Program at the trial of Defendant Drummond in the above entitled case.

MCA 26-1-807 provides that the confidential relations and communications between a psychologist and his client shall be placed on the same basis as provided by law for those between an attorney and his client.

Defendant Drummond was sentenced by this Court to the certainly far reaching [sic] when one considers the net affect [sic] they will have on present and future Court ordered participants in sexual offender treatment programs at MSP or elsewhere. Defendants will be placed in the "Catch 22" situation that they cannot achieve probation or parole without participation but participation and disclosure will potentially result in additional charges and additional sentences.

WHEREFORE, Defendant Drummond respectfully requests a Protective Order from this Court preventing any psychologist with whom Defendant Drummond had a doctor/patient relationship from testifying in any manner whatsoever in the above entitled case. This prohibition from testimony should also extend to facts and information which originated with Defendant Drummond's own psychologist but were passed on to other individuals.

DATED this 18 day of June, 1992.

/s/ Joseph R. Massman
Joseph R. Massman

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing document was mailed postage fully prepaid by United States mail on the 18 day of June, 1992, and addressed to the following:

Richard Llewellyn
Jefferson County Attorney
Courthouse, P.O. Box H
Boulder, Montana 59632

/s/ Joseph R. Massman

MONTANA FIFTH JUDICIAL DISTRICT
COURT, JEFFERSON COUNTY

STATE OF MONTANA,	)	Cause No. 1365
	)	
Plaintiff,	)	**MINUTE ENTRY OR**
vs.	)	**NOTICE OF RULING**
	)	Dated July 22, 1992
LLOYD DEAN	)	Before Hon. FRANK M.
DRUMMOND,	)	DAVIS
	)	Court Reporter
Defendant.	)	Julie Misemer
	)	Clerk Marilyn J. Stevens
	)	Recorded Doc. CME1

Defendant's request for Change of Plea hearing came on this day with Defendant present in custody of Sheriff and with Public Defender, Joseph R. Massman. State of Montana was represented by Jefferson County Attorney, Richard J. Llewellyn.

State advised that no plea negotitions [sic] had taken place but Defendant requested no further prosecutions be filed; State would not prosecute if all sexual offenses against Montana Developmental Center residents were provided to the State in writing and these offenses would not be prosecuted.

Mr. Massman agreed with State that no negotions [sic] had been made; that an updated Pre-Sentence Investigation would be requested and each counsel would give a separate recommendation for sentencing.

Court determined that Defendant's name was true; that he had received the Information and reading thereof was waived; charges and punishment therefor were advised and Defendant had sufficient time to talk with counsel regarding the case. Defendant requested to withdraw his former plea of Not Guilty. No plea bargain had been discussed and Court would not be bound by plea negotiations. After fully advising Defendant of his rights, Court allowed the Defendant to withdraw his former plea of Not Guilty and Defendant then plead [sic] "GUILTY". State requested clarification on which Count Defendant was pleading to since the charges were in the alternative. Mr. Massman advised that Defendant was pleading Guilty to Count I, Sexual Assault.

Court accepted Defendant's Plea of Guilty to Sexual Assault, in open Court with Defendant's counsel present, Defendant having been advised of his rights, understanding them and waiving them.

Counsel requested an up-dated Pre-Sentence Investigation to cover this case as well as Cause #1364 so when Pre-sentence Investigation and Report is received, both causes can be set for sentencing at the same time. Mr. Massman will consult with Jim Wright who is preparing the Pre-Sentence.

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MONTANA FIFTH JUDICIAL DISTRICT
COURT, JEFFERSON COUNTY

STATE OF MONTANA, Plaintiff, v. LLOYD DEAN DRUMMOND, Defendant.	)	Cause No. 1364 **MOTION FOR LEAVE TO FILE INFORMATION AND AFFIDAVIT IN SUPPORT THEREOF**

MOTION

COMES NOW Richard J. Llewellyn, Jefferson County Attorney, and moves this Court for leave to file an Information charging the above-named Defendant, LLOYD DEAN DRUMMOND, with committing the criminal offense of PERJURY, a felony, in violation of Section 45-7-201, MCA, and as alleged in the alternative in the proposed Information filed herewith.

This motion is made on the grounds and for the reasons set forth in the accompanying Affidavit filed in support hereof.

DATED this 29th day of January, 1992.

/s/ Richard J. Llewellyn
RICHARD J. LLEWELLYN
Jefferson County Attorney

AFFIDAVIT

STATE OF MONTANA)
: ss.
County of Jefferson)

COMES NOW Richard J. Llewellyn and, being first duly sworn, deposes and upon his oath states that:

1. Affiant is the duly elected, qualified and authorized County Attorney for Jefferson County, Montana. He makes this Affidavit, in his said capacity, in support of the foregoing Motion for Leave to File Information.

2. Affiant has interviewed Steve Sparhawk (a Criminal Investigator with the Montana Attorney General's Office), Tim Campbell (Undersheriff of Jefferson County), Jim Obie (attorney for the Montana Department of Corrections and Human Services), Curt Drake (a Helena attorney who represented the State of Montana in McGuire v. State of Montana, et al., Cause No. 88-C-459 before the Montana Second Judicial District Court, Silver

Bow County), Cherrill Rolfe (a social worker with the Montana Department of Family Services), Don Ferriter (a social worker with the Montana Department of Family Services), Barbara Howe (a child psychologist practicing in Helena, Montana, who counsels Jane Doe), and others. Affiant prosecuted the case of State v. Lloyd Dean Drummond, Cause No. 1252 before this District Court, in which Lloyd Dean Drummond was prosecuted, convicted and sentenced for committing the offense of Sexual Intercourse Without Consent, a felony, against Margretta Glover, and Affiant is fully familiar with such proceeding. Affiant has obtained a transcript of the sentencing hearing conducted in said proceeding on October 11, 1989. Affiant is further familiar with the said cause of McGuire v. State of Montana, et. al., which was tried in Silver Bow County District Court on or about March 19, 1991. Affiant has obtained, and has reviewed, a transcript of testimony presented by Lloyd Dean Drummond at the trial of said cause. Affiant has further reviewed a large number of investigative reports prepared by various law enforcement officers and DFS social workers, all pertaining to the events hereinafter described. On the basis of all such interviews, proceedings, transcripts, and investigative reports, Affiant makes the allegations hereinafter set forth.

3. Margretta Glover is a profoundly retarded, incapacitated person who, during 1988, was institutionalized at the Montana Development [sic] Center in Boulder, Jefferson County, Montana. During the fall of 1988, it became apparent that Glover was pregnant. By virtue of her profound mental retardation, Glover was incapable of consenting to an act of sexual intercourse.

4. An intensive investigation was thereafter conducted by the Montana Department of Institutions (now the Montana Department of Corrections and Human Services), by investigators with the Criminal Investigation Bureau of the Montana Attorney General's Office, and by officers of the Jefferson County Sheriff's Office.

5. At the conclusion of said investigation, Lloyd Dean Drummond confessed to having sexual intercourse with Glover on one occasion while he was a direct care attendant at the Montana Developmental Center. According to Drummond, he had engaged in sexual intercourse with Glover on only one occasion.

6. Affiant thereafter charged Drummond in this District Court with the offense of Sexual Intercourse Without Consent, a felony, in violation of Section 45-5-503, MCA. Drummond plead [sic] "not guilty" to the charge and, while awaiting trial, he was released to the custody of a local Boulder minister. During the following months, Drummond resided in Boulder, and his status and activities were periodically monitored by law enforcement authorities and by social workers with the Montana Department of Family Services.

7. Drummond appeared before this District Court on August 9, 1989, and withdrew his "not guilty" plea. At such time, he entered a plea of "guilty" to the charge of Sexual Intercourse Without Consent, and the District Court ordered the conduct of pre-sentence investigation. Upon completion of the pre-sentence investigation and the completion of a pre-sentence report, Drummond appeared for sentencing on October 11, 1989. In an attempt to obtain a substantial sentence for Drummond, the State introduced testimony, regarding certain

"aggravating" factors, including testimony alleging that Drummond had been involved in sexual offenses against other MDC residents. In response, Drummond himself took the stand, was duly sworn on oath, was examined by his own attorney, and was cross-examined [by] Affiant.

8. In an attempt to obtain a lenient and/or probationary sentence from the Court, Drummond expressly denied that he had been involved in "sexual misconduct" with any other residents of the Montana Developmental Center. He testified that his rape of Margretta Glover was the "only incident of sexual misconduct" at MDC. Drummond further testified that he had been a "law abiding-citizen" during the approximately ten (10) months between the time he was interviewed by investigators and the date of the sentencing hearing.

9. As the result of the rape of Margretta Glover, her subsequent pregnancy, and the birth of her child, her mother (individually, as Margretta Glover's guardian, and on behalf of her child), sued the State of Montana, the Montana Department of Institutions, the Montana Developmental Center, and Carroll V. South, the Director of said Department. This lawsuit, which sought substantial monetary damages from the Defendant, was tried before the District Court in Silver Bow County during March of 1991. Drummond was called as a witness during said trial. He testified under oath that he had sexually assaulted Margretta Glover, on several occasions and over a period of time, prior to raping her. Drummond further testified that he had raped Glover not only on the one occasion, but on two other occasions as well. Further, Drummond testified that he sexually assaulted, sexually abused, and sexually fondled several other MDC residents.

10. Jane Doe is a female descendant of Drummond. During the ten months in 1989, prior to Drummond's sentencing hearing, Jane Doe was under the age of fourteen (14) years. She resided in the Drummond family home and was in frequent contact with Drummond. Between approximately October of 1991 and January of 1992, Jane Doe advised several persons that she had been sexually abused on numerous occasions by Drummond. According to Jane Doe, Drummond had sexually assaulted her (by touching her "private parts" so that they "hurt") between December 30, 1988, and October 11, 1989. These persons included Barbara Howe (Jane Doe's counselor) and Sharon Miller.

11. As a convicted sex offender, Drummond was required to participate in a sex offender program at the Montana State Prison. During the course of such program, Drummond admitted to having sexually abused Jane Doe. This information was communicated by prison officials to the Montana Department of Family Services, in accordance with the applicable Montana law requiring the reporting of child abuse information.

12. On December 23, 1991, Drummond was interviewed by Don Ferriter, at the Montana State Prison, in the presence of Pennie Lundstrom (also a DFS social worker) and Tim Hamm, a prison "therapist." During the course of the interview, Drummond stated that, during and after approximately January of 1989, he had begun a sexually-oriented "grooming" process with Jane Doe. (Drummond stated that he was "attracted" and "aroused" by Jane Doe's presence.) According to Drummond, this "grooming" process was intended to prepare Jane Doe for Drummond's ultimate sexual gratification. According to Drummond, he touched Jane Doe "in the crotch" twenty

(20) to thirty (30) times during this period of approximately six (6) to ten (10) months.

13. Further, Affiant sayeth naught.

/s/ Richard J. Llewellyn
RICHARD J. LLEWELLYN
Jefferson County Attorney

SUBSCRIBED AND SWORN TO before me this 29th day of January, 1992.

/s/ Cheri L. Kramer
Notary Public, State of Montana
(NOTARIAL SEAL) Residing at: East Helena
My Commission expires: 1/25/95

RICHARD J. LLEWELLYN
Jefferson County Attorney
Courthouse, P.O. Box H
Boulder, Montana 59632
(406) 225-4251 ext. 57

MONTANA FIFTH JUDICIAL DISTRICT
COURT, JEFFERSON COUNTY

STATE OF MONTANA,	)	Cause No. 1364
	)	
Plaintiff,	)	**INFORMATION**
	)	
v.	)	
	)	
LLOYD DEAN DRUMMOND,	)	
	)	
Defendant.	)	
	)	
STATE OF MONTANA	)	
	: ss.	
County of Jefferson	)	

Richard J. Llewellyn, Jefferson County Attorney, being first duly sworn, deposes and upon his oath says that the above-named Defendant, LLOYD DEAN DRUMMOND, has committed the criminal offense of PERJURY, a felony, in violation of Section 45-7-201, MCA, and as alleged in the alternative in Counts I and II hereof.

The offense of PERJURY, a felony, is punishable by imprisonment in the Montana State Prison for a term not exceeding ten (10) years and/or by a fine not exceeding $50,000.

The facts constituting the said offense are as follows:

COUNT I

The Defendant, LLOYD DEAN DRUMMOND, in the course of an official proceeding, to-wit: a sentencing hearing conducted before this District Court on October 11, 1989, at Boulder, within Jefferson County, Montana, knowingly made a false statement or statements under oath, which said statement or statements was or were material, in that said Defendant testified:

(a) That the "only incident of sexual misconduct that [he] ever committed during the period of time that [he] worked at the M.D.C. (the Montana Developmental Center)" was committed against Margretta Glover, and not against any other residents of said institution, when the said Defendant had in fact sexually assaulted, sexually abused, and/or sexually fondled other residents of the said institution; and/or,

(b) That he had conducted himself "as a law-abiding citizen over the course of [the] ten months" prior to the said sentencing hearing, when the Defendant had during such time actually committed repeated offenses of Sexual Assault, a felony, in violation of Section 45-5-502, MCA, or Incest, a felony, in violation of Section 45-5-507, MCA, upon Jane Doe, a female descendant who

was less than fourteen (14) years old, with the Defendant being three (3) or more years older than Jane Doe; or,

COUNT II

As a different and alternative statement of the same offense alleged in Count I hereof,

The Defendant, in official proceedings, to-wit: a sentencing hearing conducted before this District Court on October 11, 1989, at Boulder, within Jefferson County, Montana, on October 11, 1989, and a trial conducted before the Montana Second Judicial District Court on March 19, 1991, at Butte, within Silver Bow County, Montana, knowingly made inconsistent statements under oath, which said statements were material, as follows:

> In the Boulder proceeding, the Defendant testified that "the only incident of sexual misconduct that [he] ever committed during the period of time that [he] worked at the M.D.C. (the Montana Developmental Center)" was committed against Margretta Glover, whereas in the Butte trial, the Defendant testified that he had sexually assaulted, sexually abused, and/or sexually fondled several other residents of said institution in addition to Magretta [sic] Glover.

A list of possible witnesses for the State of Montana, now known to the prosecution, is as follows:

Kathy C. Hilton
Dillon, MT

Laurie Crutcher
Helena, MT

William P. Joyce
Butte, MT

Frank Burgess
Butte, MT

Jim Obie
Helena, MT

G. Curtis Drake
Helena, MT

Glenn Drake
Helena, MT

Jane Doe
Montana City, MT

Sharon Miller
Montana City, MT

Barbara Howe
Helena, MT

Don Ferriter
Helena, MT

Tom Dawson
Boulder, MT

Jim Wright
Butte, MT

Tim Campbell
Boulder, MT

Tom Dolan
Helena, MT

Margaret McGuire
Butte, MT

Cherrill Rolfe
Helena, MT

Steve Sparhawk
Helena, MT

Jim Wannacutt
Butte, MT

Holly Urness
Basin, MT

Pennie Lundstrom
Butte, MT

Tim Hamm
Butte, MT

Tim Schmidt
Boulder, MT

Chris Alexandria
Boulder, MT

DATED this 29th day of January, 1992.

/s/ Richard J. Llewellyn
RICHARD J. LLEWELLYN
Jefferson County Attorney

SUBSCRIBED AND SWORN TO before me this 29th day of January, 1992.

/s/ Cheri L. Kramer
Notary Public, State of Montana
(NOTARIAL SEAL) Residing at: East Helena
My Commission Expires: 1/25/95

MONTANA FIFTH JUDICIAL DISTRICT
COURT, JEFFERSON COUNTY

STATE OF MONTANA,	)	Cause No. 1364
	)	**MINUTE ENTRY OR**
Plaintiff,	)	**NOTICE OF RULING**
	)	Dated June 10, 1992
vs.	)	Before Hon. FRANK M.
	)	DAVIS
LLOYD DEAN	)	Court Reporter
DRUMMOND,	)	Laurie Crutcher
	)	Clerk Marilyn J. Stevens
Defendant.	)	Recorded Doc. CME1

Defendant's request for Change of Plea hearing came on this day with Defendant present in the custody of the Sheriff and with Public Defender, Joseph R. Massman. State of Montana was represented by Jefferson County Attorney, Richard J. Llewellyn.

Mr. Massman advised Court that Defendant would be willing to plea Guilty to charge of Perjury if Stipulation allowing appeal on the legal issue of immunity could be entered with the State. No negotiations for sentencing has [sic] occurred and State discussed the problems of appealing the immunity issue since no brief was filed by Defense on their Motion to Dismiss with no formal conclusions by the Court of summary argument heard on 5/20/92. State requested to continue the trial date and have new hearing on Motion to Dismiss.

Defense advised of relatedness of Cause #1365 with this case and that Defendant would be willing to plead to

both cases if concurrent sentences could be imposed. State objected to concurrent sentencing. Mr. Massman requested a briefing schedule and hearing date for both cases.

Court then proceeded with the Change of Plea hearing at request of Defense. Court determined Defendant's name was true, advised of the charge and punishment therefor and determined that Defendant had sufficient time to discuss the case with his attorney. No one had threatened Defendant to change his plea, no agreement regarding sentencing has been discussed and Court would not be bound by plea agreement anyway. Defendant plead [sic] Guilty to the allegations of Purgery [sic] but felt he had been granted immunity in the Civil trial in Butte.

Court allowed the Defendant to withdraw his former plea of not guilty (on 1/29/92) and Defendant then plead [sic] "GUILTY" to the charge of Perjury. Court accepted the plea of Guilty in open Court, with Defense attorney present, Defendant having been advised of his rights, understanding them and waiving them.

Court and State will not require a Pre-Sentence Investigation although Adult Probation and Parole will need to get an update from Montana State Prison regarding Defendant's sex offender's treatment program. (Mr. Massman advised Defendant was now in Stage 2 of the plan).

State requested clarification of Defendant's plea whereupon Lloyd Dean Drummond was sworn and testified. Mr. Massman stipulated that the civil lawyer in

Butte case was not connected with the State (regarding immunity).

Court expressed a desire to dispose of Cause #1365 at this time also but upon Defense's request that the jury trial presently set for July 22, 1992 remain, Court continued the imposition of sentence for this Cause #1364 until after the trial in Cause #1365.

Defendant was remanded to custody of Sheriff for transportation back to the Montana State Prison.

Filed: Sep. 18, 1992
Marilyn J. Stevens,
Court Clerk

MONTANA FIFTH JUDICIAL DISTRICT COURT

JEFFERSON COUNTY

* *

STATE OF MONTANA,	*	Cause Nos. 1364 & 1365
	*	
Plaintiff,	*	
	*	
v.	*	FINDINGS OF FACT,
	*	JUDGMENT &
LLOYD DEAN DRUMMOND,	*	SENTENCE
	*	
	*	
Defendant.	*	

* * * * * * * * * * * *

The Defendant LLOYD DEAN DRUMMOND came before the Court for sentencing on August 26, 1992. From the evidence, presentence report and recommendations the Court now makes its:

FINDINGS OF FACT

1. The Defendant LLOYD DEAN DRUMMOND heretofore entered a voluntary plea of GUILTY to the following offenses:

A. SEXUAL ASSAULT, a felony (Cause No. 1365)

B. PERJURY, a felony (Cause No. 1364)

2. In entering his pleas of GUILTY, the Defendant reserved his right to effect an appeal on certain constitutional grounds, and the pleas were accepted with that reservation.

3. The Defendant is presently in the Montana State Prison on a twenty year maximum sentence imposed by this Court for his conviction of the felony offense of SEXUAL INTERCOURSE WITHOUT CONSENT. That sentence has now been reviewed by the Sentence Review Division of the Supreme Court and has been affirmed.

4. The Court finds pursuant to Sec. 46-16-123, MCA and Sec. 46-18-115, MCA, the personal appearance by the Defendant is not required for imposition of sentence. He is in prison. He attended the sentencing hearing with counsel. He made a statement of mitigation on his own behalf. He has appeared personally and with counsel at all prior proceedings herein. He is fully advised of the contents of the report of the presentence investigation and the respective recommendations. The furtherance of justice and judicial economy, as well as the protection of all the Defendant's rights is fully ensured by the imposition of the sentence in absentia under all the circumstances.

Having made this finding as to the necessity of the Defendant's further presence, the Court has in its Judgment and Sentence granted a reasonable stay of execution to permit the Defendant if he elects to do so the right to personally appear for a formal imposition.

5. The Defendant's offenses as charged in the Information, as well as the one of which he has previously been convicted are all sexually oriented. He is addressing his sexual problems by participating in the sex offender program at the State Prison. The successful completion of that program is a condition for parole eligibility.

From these findings the Court now enters its:

JUDGMENT

I

LLOYD DEAN DRUMMOND is in fact guilty of the felony offenses of SEXUAL ASSAULT as alleged in the Information.

II

LLOYD DEAN DRUMMOND is in fact GUILTY of the felony offense of PERJURY as alleged in the Information.

For the Defendant's convictions, the Court now imposes the following:

SENTENCE

I

For his conviction of the felony offense of SEXUAL ASSAULT, the Defendant is sentenced to a term of ten years in the Montana State Prison with 10 years suspended; said sentence to run consecutive to the twenty year term which he is now serving.

II

For his conviction of the felony offense of PERJURY, the Defendant is sentenced to a term of ten years in the Montana State Prison to run concurrent with the sentence, herein imposed as well as the sentence imposed in Cause No. 1252.

III

IT IS FURTHER ORDERED that execution of the sentences herein imposed shall be stayed for thirty (30) days to permit the Defendant if he elects to do so the opportunity of making a personal appearance before the Court for formal imposition of the sentences herein imposed. Should the Defendant fail to exercise this right granted to him, the sentences as herein imposed shall be effective as of this date.

IV

For clarification of the Defendant's sentences and for the guidance of the records department of Montana State Prison, the Court summarizes the sentences herein imposed as follows:

A. For his conviction of SEXUAL ASSAULT he is sentenced to ten years in Montana State Prison to run consecutive to the twenty years he is presently serving.

B. For his conviction of PERJURY he is sentenced to a term of ten years to run concurrent with all previous sentences.

V

IT IS FURTHER ORDERED that under no circumstance is the Defendant to be eligible for parole until he successfully completes the sex offender program at Montana State Prison.

VI

IT IS FURTHER ORDERED that the sentences herein imposed is [sic] without prejudice to Defendant's rights heretofore reserved to perfect an appear [sic] of his conviction herein for any reason.

DATED this 16th day of September, 1992.

/s/ Frank M. Davis
District Judge

REASONS FOR THE SENTENCE

The reasons for the sentences herein imposed are basically set forth in the decision. The Court would simply add:

The Defendant's offenses are of the nature which rendered him a danger to society. His chances of rehabilitation are marginal at best, but to his credit he acknowledges this fact, and is now attempting to address the problem by his participation in the sexual offender program at the Prison. The Court was impressed with what appeared to be an attitude of genuine remorse. He is indeed sick under the normal criteria. Since he concedes this, the Court believes the herein imposed sentence is well within the sentencing criteria. He has

preserved his right to appeal, but the Court would hope that he accepts his punishment and continues to address his sickness without further technical legal objections. The problem is his sickness, not his constitutional rights. He could very well win the legal battle, but lose the war. At this time he is a menace to his family and indeed society. The Court believes that he recognizes this fact, and hopes that he will continue to address it as he is now doing.

/s/ Frank M. Davis

cc: Richard J. Llewellyn
Joseph R. Massman
James Wright, AP&P
Montana State Prison (on 10/18/92)
Lloyd Dean Drummond